IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Nos. 79-4, 79-5 and 79-491

JASPER F. WILLIAMS and EUGENE F. DIAMOND,
Appellants,

v.

DAVID ZBARAZ, et al.,
Appellees.

JEFFREY C. MILLER, Acting Director,
Illinois Department of Public Aid, et al.,
Appellants,

v.

DAVID ZBARAZ, et al.,
Appellees.

UNITED STATES,
Appellant,

v.

DAVID ZBARAZ, et al.,
Appellees.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF THE STATES OF WISCONSIN AND OHIO AS AMICI CURIAE IN SUPPORT OF APPELLANTS

STATE OF WISCONSIN
BRONSON C. LA FOLLETTE
Attorney General
F. JOSEPH SENSENBRENNER, JR.
Assistant Attorney General
114 East, State Capitol
Madison, Wisconsin 53702
608-266-5710

STATE OF OHIO
WILLIAM J. BROWN
Attorney General

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INTEREST OF AMICI CURIAE

The states filing this brief have a direct financial and public policy interest in the outcome of this case. At stake are state and federal efforts to determine how public funds are allocated. Also at stake are concerns as expressed by organized society on what are the appropriate limits of personal and societal interests in matters of the utmost sensitivity and gravity: governmental provision of public resources to effectuate a decision to abort a human fetus.

The elected representatives of both Ohio[1]/ and Wisconsin[2]/ have enacted into their state statutes limitations on the circumstances where public funding will be provided to cover the performance of an abortion in their state Medical Assistance Programs.[3]/ These state limitations are essentially similar to those Illinois statutory provisions struck down in the instant case. They are also essentially similar to the federal statutory provisions struck down in the instant case.

Wisconsin and Ohio as sovereign states have interests, more fully set forth in the Argument of this brief, which have equal vigor and dignity as those of Appellant representatives of the State of Illinois. Their citizens should be heard on the matters at issue.

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[1]/Section 210 of House Bill 204, 113th Ohio General Assembly.

[2]/Section 20.927, Stats., (1977)

[3]/These are plans of state participation in the federal program codified in 42 U.S.C. § 1396 *et seq* (Medicaid Program).

QUESTIONS PRESENTED

1. Did the Supreme Court in *Poelker v. Doe,* 432 U.S. 519 (1977), hold that limitations on public funding of abortions more restrictive than those enacted here are constitutional.

2. Does other Supreme Court precedent, principally *Maher v. Roe,* 432 U.S. 464 (1977), and *Roe v. Wade,* 410, U.S. 113 (1973), support the limitations on public funding of abortions enacted here.

SUMMARY OF ARGUMENT

The claims of the instant plaintiffs have been considered and rejected by this court in *Poelker v. Doe,* 432 U.S. 519 (1977). The named plaintiff in *Poelker* presented the same claim arising from her medical condition as the instant plaintiff class seeking governmental funding for certain "medically necessary" abortions. The plaintiff class in *Poelker* also included the instant plaintiff class claims. Their rejection in *Poelker* requires rejection here.

Further, *Maher v. Roe,* 432 U.S. 464 (1977) held that affirmative funding decisions such as those challenged here do not in any way infringe on a woman's right to choose an abortion. The circumstance of a woman having a certain health condition also not caused by the legislature's funding decisions does not create an effect where none existed before. *Id.* at 473-474. *Maher* also held that the state's interest in the potential life of the fetus was strong and legitimate. There being no burden imposed and a strong state interest, the funding choices are constitutional.

ARGUMENT

***Amici* submit that the district court erred in two basic respects. The first is that it ignored the holding of *Poelker v. Doe,* 432 U.S. 519 (1977). The second is that other precedent, principally *Maher v. Roe,* 432 U.S. 464 (1977) and *Roe v. Wade,* 410 U.S. 113 (1973), have been improperly interpreted by the court below.**

I. The Supreme Court, In *Poelker v. Doe,* Held That The Limitations On Public Funding Of Abortions More Restrictive Than Those Enacted Here Are Constitutional.

Plaintiffs' principal argument appears to be that federal and state legislative determinations regarding the types of services to provide recipients of the Medicaid Program unduly burdens the rights of plaintiffs, indigent pregnant women seeking "medically necessary"[4]/ abortion and abortion performing physicians. This same claim, related to a more restrictive city regulation, was rejected by this court in *Poelker v. Doe, supra.* This clear legal precedent is controlling.

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[4]/The Illinois Medicaid Program covers some medically necessary abortion procedures. It covers those circumstances where the procedure is "necessary for the preservation of the life of the ... woman ..." P.A. 80 1091. Rev. Stat. Supp. 1978, ch. 23, sec. 5-5. It does not cover abortion procedures where the health of the mother is impaired to a lesser degree. Thus, it does not cover the entire range of circumstances that a physician may view as "medically necessary" as ordered by the court below. 469 F. Supp. at 1221. Hereinafter such mandated subset of medically necessary procedures will be referred to as "medically necessary."

The "regulation" challenged by an indigent pregnant woman in *Poelker* "prohibited the performance of abortions in the city hospitals except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520.

The federal and state laws challenged in the instant case are less restrictive. They prohibit no hospital or physician from performing therapeutic[5]/ abortions. They only restrict[6]/ state funding of abortions in its Medical Assistance Program to circumstances very similar to that in *Poelker.*

In *Poelker,* the plaintiff asserted that closing the doors of public hospitals for nontherapeutic abortions denied her "equal protection of the law" by allowing other medical procedures, including maternity care incident to term childbirth. 515 F.2d at 544. The court of appeals, in its opinion could find "[n]o rational or legally cognized basis for this distinction." *Id.* at 544.

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[5]/Therapeutic, as used by the parties and courts in *Poelker,* means abortions "to save the mother from grave physiological injury or death." 515 F.2d 541, 543.

The term is used in the principal cases (*Beal v. Doe,* 432 U.S. 438 (1977), *Maher* and *Poelker* with a meaning that is shaped by the underlying facts of each case. Thus, circumstances covered by the regulation at issue are denominated "therapeutic," those not covered "non-therapeutic." Because the challenged regulations vary from case to case, the content of the terms varies. They are "nonconforming." *Doe v. Mundy,* 441 F. Supp. 447, 451 (E.D. Wis. 1977).

[6]/Although the federal law allows the states to fund more services than those covered by the Hyde Amendment, Illinois has chosen to fund only substantially the same services. Thus, as challenged here the

The United States Supreme Court followed the same method of legal analysis employed by circuit court, but reached a conclusion which forecloses the claim in the instant case. It upheld the city's policy by finding ample rational and legal support for its determination. The language used by the court is particularly instructive in the instant case:

> We agree that the constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth. [*Maher v. Roe,* 432 U.S. 464 (1977)] ... [w]e find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

432 U.S. at 521.

In *Maher v. Roe,* after disposing of irrelevant claims the Supreme Court recognized two rational and legitimate state interests which validated the Connecticut Public Assistance regulation[7]/ which funded

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effect of the federal law in conjunction with the actions of the Illinois Legislature will be referred to as the effect of both laws.

[7]/Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, ch. III, § 275, provides in relevant part:

> "The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following condition is met:

childbirth but not "nontherapeutic" abortions. 432 U.S. at 478. The first is the "States strong interest in protecting the potential life of the fetus." *Id.* The court noted that this interest exists "throughout the pregnancy." *Id.* The court unequivocally stated "[T]here can be [no] question that the Connecticut regulation rationally furthered that interest." *Id.*

The second legitimate interest, equally applicable in *Poelker* and the instant case, involves "demographic concerns about its rate of population growth. Such concerns are basic to the future of the State." *Id.*, fn. 11.

Amici concede that the regulation in *Maher* reflects a policy judgment to fund more types of abortion procedures than the federal and state laws at issue here provide. Were it the only directive given by the Supreme Court, the instant matter would be open to considerable legal argument. However, the resolution of the "constitutional question...identical in principle" in *Poelker* (432 U.S. at 521) by the Supreme Court, where the governmental prohibition was more absolute, forecloses further debate on whether the scope of *Maher* should be limited to its facts. It cannot be so limited. The Supreme Court found prohibitions by the city of St. Louis challenged in *Poelker* are explicitly within the legal principles applicable in *Maher.*

A. The class in Poelker included women seeking medically necessary abortions.

"1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity.

Poelker v. Doe was treated[8]/ as a class action throughout the appellate process. References to the class plaintiffs include:

> "We conclude here that Doe has standing ... and her class can be recognized." 497 F.2d 1063, 1067 (8th Cir. 1974).
>
> "... this civil rights class action ...." 515 F.2d 541, 542 (8th Cir. 1975).
>
> "The official city policy and the 'staffing procedure' were applied to Doe and the other members of her class ...." *Id.* at 544.
>
> "We conclude that the city policy against all nontherapeutic abortions together with the staffing procedures at the OB-GYN clinic of the city hospital combined to deny Doe and her class ...." *Id.* at 545.

Finally, this court used unambiguous language in stating the representative role of plaintiff Doe. "She ... brought this class action ..." 432 U.S. 519 (1977).

It is crucial, therefore, to determine whether the class of plaintiffs in *Poelker* included women for whom an abortion was "medically necessary." If the *Poelker* plaintiffs included such a class, then this court's upholding the regulation at issue there, clearly at least

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8. Both plaintiffs' and defendants' counsel in *Poelker* have advised this counsel that a formal class certification had never been ordered by the trial court. The clerk, Federal District Court, Eastern District of Missouri, confirmed that there was no such docket entry. The court, after remand from the Eighth Circuit with the directive "... Doe has standing ... and her class can be recognized" 497 F.2d 1063, 1067 (8th Cir. 1974), apparently did not formally enter such an order.

as restrictive as those at issue in the instant case, would represent clear precedent foreclosing the instant plaintiffs' claims.

The class is described in the complaint as "consisting of pregnant, women residents of the City of St. Louis, Missouri, desiring to utilize the personnel, facilities and services of the general public hospitals within the City of St. Louis, Missouri, for the medical termination of said pregnancy." Complaint par. 12 (Appendix at 3.)

There is no limit placed on the reasons underlying or compelling the "desire" to use the services by the language of this description. There is no principle of law that limits the meaning, therefore, to persons seeking an abortion at a whim, pursuant to religious or philosophical beliefs, for optional medical treatment, for necessary medical treatment or any other reasons deemed insufficient by the standard imposed by the regulation challenged. All persons seeking an abortion for reasons other than for therapeutic purposes are included.

The class of excluded women thus found to have standing in *Poelker* and whose claims are represented by Doe include, therefore, women seeking "medically necessary" abortions within the meaning of the terms in this lawsuit. There can be no doubt the instant plaintiff and her class could not have qualified under the *Poelker* regulation. That women seeking "medically necessary" abortions are among the class in *Poelker* is clear when one considers whether they would be barred from any relief granted. It cannot be denied they would benefit from the decision as members of the class. They must also be bound by it.

Additional support for this conclusion is found in the circumstances and characteristics of the named plaintiff. Since she is representative of, as well as a

constituent part of, the class, her personal condition is critical to understanding the class. That she also comes within the instant case will be demonstrated in sec. I.B. *infra*.

In sum, the class in *Poelker* included women making the claim advanced by plaintiffs in the instant case. Their claims were rejected in *Poelker*. They are foreclosed.

B. The named plaintiff in Poelker presented the claim made by the instant plaintiffs.

The plaintiff in *Poelker*, had all the attributes of the class certified in the instant case save the official labelling of "medically necessary" *in haec verba*.

The class characteristics of indigency and eligibility for public medical assistance are patent.

The nature of the relevant physical medical need defining the class has been determined in the instant case to be "medically necessary but not necessary for the preservation of [life]" 469 F. Supp. at 1213 fn. 1.

In her verified complaint plaintiff Doe in *Poelker* stated "On [two] occasions she was advised by [Max C. Starkloff Hospital] staff physicians to seek an abortion ... and then to return to said hospital for a *hysterectomy* ... a procedure *recommended by* said hospital *staff physicians based upon her medical and physical condition.*" Complaint par. 10. (Appendix at 3.) (emphasis supplied.) See also Affidavit of Plaintiff, Jane Doe par. 7. (Appendix at 8.)

It may be argued by the instant plaintiffs that there is technically no determination in the record[9]/

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[9]/Plaintiffs may argue that this record is unclear or is contradicted by certain affidavits of certain

that the hysterectomy was "medically necessary" but only "recommended." Therefore it may be suggested, even though the abortion was the essential first step of a recommended procedure, the basis for the procedure is not adequately established.

The record in *Poelker,* however, establishes that the staff at Max C. Starkloff was bound by regulation only to recommend procedures which "accomplish sterilization" such as a hysterectomy for "medical indications." Max C. Starkloff Hospital, Part II — Rules and Regulations, E. *General Rules Regarding Abortions and Sterilizations,* quoted in part in defendants' Answer to Interrogatories in *Poelker*. (Appendix at 12.) The *same standard* of medical necessity and no more is required before a therapeutic abortion may be performed. *Id.* The exactitude of the latter standard has been frequently and pointedly noted. There can be no doubt that both of the procedures were "medically necessary."

As much is asserted in the *Poelker* complaint where the defendants' conduct is characterized as "subjecting her life ... to increased possiblity of loss." Complaint, par. 15 f. (Appendix at 5.)

The plaintiff in *Poelker* was not seeking an abortion on a whim. She was told to get one by doctors

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physicians. The circumstance that *other* students and doctors at another setting did not make the same diagnosis (*See, e.g.* 515 F.2d 541, 543) is irrelevant. There is no requirement for a majority diagnosis in *Poelker* or here. Only one physician need establish medical need. Second, it may not be necessary to resolve this matter. Should plaintiffs contend this matter was hotly disputed, this court has disposed of the necessity for resolving this problem. 432 U.S. at 520 at fn. 1.

held to a very high standard of medical need by regulation. She was a woman in medical need of an abortion and a hysterectomy.

These essential underlying facts were apparently well understood by the Eighth Circuit when it summarized them as follows:

> Twice she consulted staff members at Starkloff Memorial Hospital ... and was advised that she would *require* a hysterectomy. They told her to procure an abortion elsewhere and then return to the hospital for the hysterectomy.

497 F.2d 1063, 1065 (emphasis supplied).

The district court in its opinion appears to consider these facts not relevant and relies on the use of the terms "therapeutic" and "nontherapeutic" to reach its conclusion as to the holding of *Poelker.*

Amici have three responses. First, no general conclusions can properly be drawn from the use of the terms therapeutic or nontherapeutic. See fn. 5, *supra.*

Second, amici suggest that detailed discussion of plaintiff's medical condition was not set forth in the *Poelker* decision because the Supreme Court considered it not relevant, *i.e.,* no matter what degree of medical need she had (less than the regulation) she was *not* entitled to relief. Amici submit that is the holding of *Poelker.*

Lastly, the underlying facts of the plaintiff's medical condition in *Poelker* were clearly part of the record considered by the Supreme Court. The concise summary of Doe's multiple health problems, which the record disclosed made an abortion medically necessary in the opinion of the staff physicians at Starkloff Hospital, was made by the Eighth Circuit in its second opinion: "Doe was suffering from cervical fibroid

tumors and polyps, an extremely retroverted uterus and trichomycosis." 515 F.2d at 543. This court stated that on the basis of the "facts as stated in [the Eighth Circuit's second] opinion," the plaintiffs' claims were found without constitutional support. 432 U.S. at 520.

They must be so found in the instant case.

C. The holding of the Supreme Court in Poelker forecloses the instant plaintiff's cause of action.

Briefly, this court was well aware of the nature and extent of the abortion procedures that the defendant in *Poelker* considered nontherapeutic[10]/ The limitations were more restrictive than at issue here. These limitations were in the context of a program of general inpatient hospital care for indigents.

The Supreme Court held, nevertheless, that there was "no constitutional violation by the City of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." 432 U.S. at 521.

The Court was well advised of the impact the board definition of nontherapeutic had had in *Poelker.* From the time the regulation went into effect until at least the second decision of the court of appeals two and one-half years later, no abortions had been performed in the city hospitals. 515 F. 2d at 544, fn. 5. Nevertheless, the court concluded: "We ... hold that the Constitution does not forbid a State ... from expressing

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[10]/The district court determined "nontherapeutic" procedures included all procedures except "to save the mother from grave physiological injury or death." 515 F.2d 541, 543. *See also,* fn. 4 *supra.*

a preference for normal childbirth *as St. Louis has done."* 432 U.S. at 521 (emphasis supplied) (footnote omitted).

In sum, both the rule and the effective foreclosing of "nontherapeutic" abortions was specifically upheld in a class action where both the plaintiff and members of the class were seeking "medically necessary" abortions in the context of a city-run inpatient hospital program. The instant plaintiffs' claim is therefore foreclosed.

II. Other Supreme Court Precedent, Principally *Maher v. Roe* And *Roe v. Wade,* Support The Limitations On Public Funding Of Abortions Enacted Here.

As properly acknowledged by the court below, the proper analytical process to be used in analyzing abortion funding legislation is explicated in *San Antonio School District v. Rodriquez,* 411 U.S. 1 (1973). This balancing process involves characterizing and then quantifying the interests at stake. The court below erred in the way it took both steps and, consequently reached an improper conclusion.

A. The impact of the state's funding decision on plaintiffs' choice was improperly characterized and weighed by the district court.

After concluding that *Poelker* was not on point, the district court applied a legal analysis relying on other Supreme Court cases. This second essential step of the district court's analysis addresses two principal concepts. The first is the nature of the women's interest in a choice in the circumstances of pregnancy as described principally in *Roe v. Wade,* 410 U.S. 113

(1973) and *Maher v. Roe,* 432 U.S. 464 (1977). The second is the state's interest which may justify influencing that choice as described principally in the same decisions. While defendant does not take issue with the district court's characterization of the individual decisions, the relationship of the facts actually before the court to the legal principles enunciated in these decisions appears unduly shaped by a fundamental misapplication of the law.

Of critical importance is the nature of the governmental influence on the choice of the pregnant woman. The court below characterized the governmental funding decisions embodied in the law as having the consequence that "the mother may be subjected to considerable risk of severe medical problems, which may even result in her death." 469 F. Supp. at 1219. This is the effect of the Medicaid program, as characterized by the court below, that was then weighed in the constitutional balance: the financial coverage of the program "subjected" women to "considerable risks."

This description of the effect of the legislative funding decisions flies in the face of the clear and repeatedly made distinction in *Maher* between "undue burdens" and "allocation of public funds."

> [The abortion related constitutional right recognized in *Roe v. Wade*]" protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

The Connecticut regulation before us is different in kind from the laws invalidated in

> our previous abortion decisions. The Connecticut regulation places no obstacles — absolute or otherwise — in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth: she continues as before to be dependent on private sources for the service she desires. The state may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in Roe. 432 U.S. 473-474 (footnote omitted).

In support of its contrary conclusion the lower court also relied on *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974). This case only by attenuated analogy is arguably supportive of the conclusion reached. Its premise and essential point of departure is the right to interstate travel and the burdens that may permissibly be placed thereon. The existence of a right and a cognizable burden are the essential elements of the analysis. The court below erred in implying both to exist in the instant case. Neither, in fact or law, exist.

First, there is no constitutional right to "necessary" medical care under the Medicaid program. *Maher v. Roe,* 432 U.S. at 469; *See* also fn 11 *infra.* The right to choose an abortion recognized in *Roe v. Wade,* 410 U.S. 113 (1973), is not the same as the right to

have the government pay for the effectuation of such a choice. *Maher, supra.* The question then becomes whether the burden imposed in any way affects a constitutionally vested right. To this question this court has provided an unequivocal answer: "The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to have abortions is neither created *nor in any way affected* by the [challenged] regulation. We conclude that the ... regulation does not infringe upon the fundamental right recognized in *Roe*" 432 U.S. at 474 (footnote omitted) (emphasis supplied).

The court below did not address this language in its opinion or explain how the holding of *Maher* and *Memorial Hospital* should be read to reach its own conclusion. It could not. It could not because the statement quoted *supra* is explained by the court as not at all diminished or circumscribed by *Memorial Hospital:* "Appellees' reliance on the penalty analysis of *Shapiro* [*v. Thompson,* 394 U.S. 618 (1967)] and Maricopa County is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right .... We find no support in the right to travel cases for the view that Connecticut must show a compelling interest for its decisions not to fund elective abortions." 432 U.S. at 474 fn. 8.

Therefore, there being no right infringed upon *and* no cognizable burden imposed, the court below fundamentally erred in framing the question before it.

Poelker and *Maher* have foreclosed the instant claim.

In sum, in quantifying the impact the federal and state funding decisions have had, the district court

supplied and weighed an effect ("subjected") at variance with this court's definition of the cognizable legal impact. There is none. There is no cognizable disparate treatment. Therefore, *no* equal protection analysis applies.

B. The state's legitimate interests are improperly characterized and diminished by the district court.

Additionally, the opinion of the district court gives too little "weight" to the governmental interest in the life of the fetus by an unduly narrow reading of *Roe v. Wade.* The district court states its conclusion concisely: "We cannot hold that the state has a legitimate interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women." 469 F. Supp. at 1220.

Again the court below substituted its own estimation of the legitimacy of the state's interest for established, authoritative precedent. In *Maher* the legitimate interest of the state is determined as summarized from other cases: "The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' an interest honored over the centuries." 432 U.S. at 478 (citation and footnote omitted).

Further, the court below erred in applying the balancing process required by *Maher:* quantifying and weighing the interest of the women and then quantifying and weighing the interest of the state separately. Because it apparently felt the burden on the women, in its opinion, was too great, it wished to reach the conclusion that the legislation was un-

constitutional. It was foreclosed however from finding the funding decision of the legislature to be too burdensome because *Maher* says it imposes "no restriction." It, therefore, in describing the *state's* interest uses as the critical element the *women's* health. The integrity of the reasoning process set forth in *Maher* is abandoned to reach a result contrary to the holding of *Maher*.

In sum, the opinion of the district court, by improperly directly applying the holding of *Wade* and *Maher* has compounded its initial critical error of improperly overvaluing the interest of the women in securing new coverage for public aid programs. *See*, sec. II-A, *supra*.

The relationship thus established by the district court's analysis is signally at variance with the Supreme Court's legal standards. Amici submit that the required weighing of the interests consistent with properly applied legal precendent sustains the minor incremental choice influencing action of the legislatures at issue here.

III. Supreme Court Precedent Supports The Funding Decisions Made By The Federal And Illinois Legislatures.

Amici submit that a proper reading of Supreme Court precedent supports the choice the federal and Illinois legislatures have made in determining what types of services to include in the Medical Assistant Program. The outline of Amici's legal analysis has been sketched in the foregoing close analysis of the opinion of the district court. An affirmative statement may additionally summarize and perhaps clarify Amici's position.

First, the Supreme Court in *Poelker* sustained the constitutionality of a regulation which excluded "medically necessary" abortions from a program providing a broad range of medical assistance.

- the regulation was more restrictive than the regulation challenged in the instant case
- the regulations excluded, and the plaintiff class therefore included, women for whom abortions were "medically necessary"
- the named plaintiff had been told to secure an abortion as a prerequisite to a "required" medical procedure
- the same constitutional principles were advanced by plaintiffs as supporting relief
- the regulation was sustained by this court

Therefore, *Poelker* is controlling precedent.

Second, even without the definitive holding of *Poelker* rejecting plaintiff's claims, other Supreme Court precedent does not support the district court's analysis. In balancing the woman's interest against the state's the following legal principles apply:

- the woman's interest as properly defined in *Maher*, (432 U.S. at 474), is not at all additionally restricted by the legislatures' funding decisions
- the attendant legally cognizable difficulty indigent women may have in securing medically necessary abortions is not "in any way affected" by the

legislatures' positive funding decisions *Id.*

- the status accorded health considerations in the context of the criminal statute in *Roe v. Wade* is inapposite in the context of legislative positive funding decisions
- there is no constitutional principle that requires that all "medically necessary" services of a particular kind be included if allegedly similar services are already provided[11]/
- a state's interest in protecting the potential life of the fetus as advanced here is valid, strong, and legitimate, *Maher,* 432 U.S. at 478
- Illinois' funding of its Medical Assistance Program rationally furthers that interest, *Id.*

Therefore, other controlling Supreme Court precedent far from providing a sound basis for the district court's decision, foreclose both its analysis and conclusion. There is, in fact and in law, no appellate

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[11]/*Cf. Legion v. Richardson,* 354 F. Supp. 456 (S.D. N.Y. 1973) (three judge panel) *aff'd sub nom. Legion v. Weinberger,* 414 U.S. 1058 (1973), *rehearing denied,* 415 U.S. 939 (1974) (upheld exclusion of under age 65 patients from coverage in an institution for tuberculosis or mental diseases contained in 42 U.S.C. sec. 1396d (a) (15) (B) (1970) although virtually all other diseases and other ages are covered); *Kantrowitz v. Weinberger,* 388 F. Supp. 1127, 1130 (D. D.C. 1974) (sustaining same statute against different Equal Protection argument) (considered *Legion, supra,* "controlling" precedent).

support for plaintiffs' position. Amici's legislative mandate is, however, manifestly squarely within the law.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed and remanded with the determination that plaintiffs have failed to establish a violation of the constitution caused by the legislatures' determinations regarding the use of public funding for health care.

STATE OF WISCONSIN

BRONSON C. LA FOLLETTE
Attorney General

F. JOSEPH SENSENBRENNER, JR.
Assistant Attorney General

114 East, State Capitol
Madison, Wisconsin 53702
608-266-5710

STATE OF OHIO

WILLIAM J. BROWN
Attorney General

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE,

Plaintiff,

vs.

JOHN H. POELKER, MAYOR OF THE CITY OF ST. LOUIS, MISSOURI,

and

R. DEAN WOCHNER, M.D., DIRECTOR OF THE DEPARTMENT OF HEALTH AND HOSPITALS AND ACTING HOSPITAL COMMISSIONER OF THE CITY OF ST. LOUIS, MISSOURI,

Defendants.

CAUSE NO. 73C 565 (A)

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Comes now plaintiff and for her cause of action states:

I. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; under United States Code, Title 28, Chapter 85, Section 1343; under United States Code, Title 28, Chapter 151 (Declaratory Judgments), Sections 2201 and 2202; and under United States Code, Title 42, Chapter 21, Section 1983.

2. The defendants are residents of and are to be found within this federal judicial district and division.

3. This is an action for a declaratory judgment and permanent injunction against the existence, application, implementation and enforcement of express and implied policies, rules, regulations, procedures and practices barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri, namely, Starkloff Memorial Hospital located at 1515 Lafayette within the City of St. Louis, Missouri and Homer G. Phillips Hospital located at 2601 Whittier within the City of St. Louis, Missouri, for the performance of abortions.

II. PARTIES

4. Plaintiff, JANE DOE, is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harrassment and is available to the Court at its order and convenience.

5. Plaintiff resides with her husband and their two children, both of whom are over seven years of age.

6. Plaintiff's husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. Plaintiff and her husband cannot afford the expense of another child and plaintiff's consequential loss of employment. Plaintiff and her family are in severe, financial straits and plaintiff is the holder of a City of St. Louis hospital clinic card.

7. Since 1965 plaintiff has incurred a minimum of five miscarriages and is presently pregnant and within the first trimester of said pregnancy.

8. During the month of August, 1973, plaintiff on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

9. Said refusals were based upon the stated policy of said hospitals, as expressed by said physicians, the same being a blanket prohibition against performing abortions.

10. Plaintiff suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then to return to said hospital for an hysterectomy, involving the permanent removal of plaintiff's uterus, oviducts and ovaries, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

11. The ordinary and routine medical procedure in plaintiff's situation is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to plaintiff.

12. Plaintiff brings this cause of action on her own behalf and on behalf of the entire class consisting of pregnant, women residents of the City of St. Louis, Missouri desiring to utilize the personnel, facilities and services of the general, public hospitals within the City of St. Louis, Missouri, for the medical termination of said pregnancy. Said class of pregnant, women

residents is so numerous that joinder of all members is impractical. There exist substantial questions of law and fact common to the class and the claims of plaintiff are typical of the claims of the class. Plaintiff will fairly and adequately represent the interests of the class.

13. Defendant, JOHN H. POELKER, is the duly elected and acting mayor of the City of St. Louis, Missouri, in said capacity is the chief executive officer of the same and as such exercises control and authority, both express and implied, over the Director of Health and Hospitals, the Health Commissioner and the general, public hospitals of said City, all of whom have a role in the existence, application, implementation and enforcement of the said policies, rules, regulations, procedures and practices herein challenged. Said defendant has on numerous past occasions publicly stated that the medical procedure of abortion will not be allowed in said city's general, public hospitals and the force and weight of his office and statements are largely responsible for the existing situation.

14. Defendant, R. DEAN WOCHNER, M.D., is the duly appointed and acting Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri and in said capacities is the principal and chief medical official of the same, having the authority and responsibility of creating, defining, applying, implementing and enforcing all said city's medical policies, rules, regulations, procedures and practices affecting the operation of said city's general, public hospitals, including those herein challenged.

III. CAUSES OF ACTION

15. Said express and implied policies, rules, regulations, procedures and practices herein challenged:

a. Interfere with and deprive plaintiff and her respective physician of the right to privacy within the patient-physician relationship and infringe upon said right, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

b. Interfere with and deprive plaintiff of her right to obtain and to receive reasonable, medical services according to the highest standards of medical practice, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

c. Interfere with and deprive plaintiff of the fundamental rights of a woman to determine for herself whether to bear children and to maintain her marital privacy in matters respecting marriage, family, sex and procreation, the same being protected and guaranteed by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

d. Interfere with and deprive plaintiff of the right to receive safe and adequate medical advice and treatment pertaining to the decision of whether to carry a pregnancy to term, the same being protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution;

e. Interfere with and deprive plaintiff of the equal protection of the laws by treating similarly situated classes differently and discriminatorily with no compelling justification for said classification, the same being protected and guaranteed by the Fourteenth Amendment to the United States Constitution; and

f. Interfere with and deprive plaintiff of due process of law by arbitrarily denying her the medical procedure of abortion without justification or cause, thereby subjecting her life and liberties to increased possibility of loss.

V. RELIEF PRAYED

WHEREFORE, plaintiff prays this Court:

16. Issue a declaratory judgment holding that any and all express or implied policies, rules, regulations, procedures and practices, barring, thwarting, limiting and infringing upon the utilization of the personnel, facilities and services of the general, public hospitals of the City of St. Louis, Missouri for the performance of abortions are in violation of the constitutional rights of plaintiff and the class of women similarly situated, as protected and guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

17. Issue a permanent injunction restraining defendants, their agents, employees, appointees and successors from applying, implementing and enforcing or threatening to apply, to implement or to enforce said policies, rules, regulations, procedures and practices herein challenged in derogation of the rights of plaintiff and said class, inasmuch as plaintiff and said class have no clear nor adequate remedy at law and

the continued acts of defendants, if not restrained, will continue to cause irreparable harm and injury to plaintiff and said class.

18. Issue such other and further orders and relief as to the Court may seem meet and proper and to tax all costs herein to defendants.

/s/ signature
FRANK SUSMAN, of the American
Civil Liberties Union of Eastern
Missouri, Attorney for Plaintiff
705 Olive
St. Louis, Missouri 63101
(314) 621-2030

GENE SCHULTZ, of the American
Civil Liberties Union of Eastern
Missouri, Attorney for Plaintiff
4355 Maryland
St. Louis, Missouri 63108
(314) 652-6491

RICHARD D. BARON, of the American
Civil Liberties Union of Eastern Missouri,
Attorney for Plaintiff
8011 Clayton Road
St. Louis, Missouri 63117
(314) 862-2525

BURTON W. NEWMAN, of the American
Civil Liberties Union of Eastern
Missouri, Attorney for Plaintiff
705 Olive Street
St. Louis, Missouri 63101
(314) 621-2030

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE,
Plaintiff,

vs.

JOHN H. POELKER, MAYOR
OF THE CITY OF ST. LOUIS,
MISSOURI, *et al.*,
Defendants.

Cause No. 73C 565 (A)

AFFIDAVIT OF PLAINTIFF, JANE DOE

Comes now Affiant, JANE DOE, and states that she submits this Affidavit in support of "Plaintiff's Motion For Summary Judgment" to which it is attached as "Exhibit A" and made a part thereof. Said Affiant further states:

1. She is a citizen of the United States and a resident and taxpayer of the City of St. Louis, Missouri and was so at all times hereinafter mentioned. Plaintiff's true identity is contained in a sealed Affidavit which is in the possession of plaintiff's counsel. Said Affidavit has been prepared to protect plaintiff from undue embarrassment and harrassment and is available to the Court at its order and convenience.

2. She resides with her husband and their two children, both of whom are over seven years of age and under sixteen years of age.

3. Her husband is unemployed and faces possible conviction and imprisonment as a result of a recent felony arrest. She and her husband cannot afford the expense of another child and plaintiff's consequential

loss of employment. She and her family are in severe, financial straits and she is the holder of a City of St. Louis hospital clinic card.

4. Since 1965 she has incurred a minimum of five miscarriages and at the time of filing this cause was pregnant and without the first trimester of said pregnancy.

5. During the month of August, 1973, she on two separate occasions requested an abortion at said Starkloff Memorial Hospital but was refused the same by physicians of the obstetrical staff and employees of said hospital, acting within the course and scope of their position and employment.

6. Said refusals were based upon the stated and admitted policy of said hospitals, as expressed by said physicians; the same being a blanket prohibition against performing abortions.

7. She suffers from cervical, fibroid tumors and polyps, a retroverted uterus and trichomycosis. On both occasions she was advised by said hospital, staff physicians to seek an abortion elsewhere and then to return to said hospital for an hysterectomy, involving the permanent removal of her uterus, oviducts and overies, a procedure recommended by said hospital, staff physicians based upon her medical and physical condition.

8. She has been advised by a private physician that the ordinary and routine medical procedure in her situation is to perform the abortion and hysterectomy in one surgical proecedure, rather than two separate and distinct procedures, thereby greatly reducing the danger and risk of mortality and morbidity to her.

9. The present and real threat by defendants to implement and to enforce the policy herein challenged deters said plaintiff from receiving medical care in a

manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

/s/ Jane Doe
JANE DOE

CITY OF ST. LOUIS)
) SS
STATE OF MISSOURI)

On this *4th* day of October, 1973, personally appeared before me, an adult female, who being first duly sworn upon her oath did state that she is the plaintiff in the above encaptioned cause, that the above and foregoing Affidavit and the statements contained therein are true to the best of her knowledge, information and belief and that she executed the same as her free act and deed and in the pseudonym of "JANE DOE".

Subscribed and sworn to before me on the day and year last above written

/s/ signature
Notary Public

My Commission Expires: June 26, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE,
Plaintiff,

vs.

JOHN H. POELKER, MAYOR OF
THE CITY OF ST. LOUIS, MISSOURI

and

R. DEAN WOCHNER, M.D.,
DIRECTOR OF THE DEPARTMENT
OF HEALTH AND HOSPITALS AND
ACTING HOSPITAL COMMISSIONER
OF THE CITY OF
ST. LOUIS, MISSOURI,
Defendants.

Cause No. 73C 565 (A)

PLAINTIFF'S INTERROGATORIES
DIRECTED TO DEFENDANT
JOHN H. POELKER

Comes now plaintiff and pursuant to Rule 33 of the Federal Rules of Civil Procedure propounds the following interrogatories to defendant Poelker.

1. State for each policy, rule, regulation, procedure, and practice which exists governing the performance or the rendering of medical abortions at public hospitals within the City of St. Louis, Missouri:

a. The date enacted or propagated;

b. The exact wording or context of the same;

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JANE DOE,
Plaintiff,

vs.

JOHN H. POELKER, MAYOR
OF THE CITY OF
ST. LOUIS, MISSOURI, ET AL.,
Defendants.

Cause No. 73C 565 (A)

ANSWERS TO INTERROGATORIES

Comes now, John H. Poelker, Mayor of the City of St. Louis, Missouri, and makes his answers to written interrogatories served with the Complaint and Summons on August 20, 1973.

Respective of the designations identifying the plaintiff's questions, I answer stating as follows, to wit:

1. City Hospital rules and regulations exemplified by "bylaws;"

a.

i) Max C. Starkloff Hospital; adopted March 1972;

ii) Homer G. Phillips Hospital; adopted April 29, 1968, and revised May 26, 1971.

b.

i) Max C. Starkloff Hospital:

"PART II — RULES AND REGULATIONS

"E. GENERAL RULES REGARDING ABORTIONS AND STERILIZATIONS

"If an operation to accomplish sterilization is recommended by the physician for medical indications, the recorded opinion of a knowledgeable consultant should be obtained.

"If sterilization is requested by the patient and the physician agrees, consultation is not necessary.

"A valid permission for a sterilization procedure for a married patient requires the written consent of the spouse when available.

"Whenever the married patient claims dissertion or for reasons of mental incompetency a notarized affidavit will be submitted in lieu of the spouse's written consent.

"In all cases where sterilization is performed primarily or results from an indicated operation, it is important that the patient understand that restoration of fertility is unlikely.

"Therapeutic abortion (the removal with legal justification of the human fetus from its mother prior to viability) will be performed only for medical reasons or indications.

"Prior to the performance of a therapeutic abortion, two consultants must agree in writing that the medical indications justify such procedure."